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The Newsman's Privilege and the Constitution

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THE NEWSMAN'S PRIVILEGE AND THE CONSTITUTION

*In doing my work, I (and those who assist me) depend constantly on information, ideas, leads, and opinions received in confidence. Such material is essential in digging out newsworthy facts and, equally important, in assessing the importance and analyzing the significance of public events. Without such materials, I would be able to do little more than broadcast press releases and public statements.**

I. INTRODUCTION

It has long been recognized that a free press plays a central role in helping to maintain the other institutions and attitudes of a free society. The Supreme Court has said "[t]he free press had been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences . . . ."[1]

In order to fulfill this mandate, "confidential relationships . . . are commonly developed and maintained by professional journalists, and are indispensible to their work of gathering, and analyzing and publishing the news."[2] These facts are more vividly shown in affidavits filed by newsmen of national stature, such as Walter Cronkite, J. Anthony Lucas, Eric Sevareid, Mike Wallace, among others, which indicate that confidential communications to newsmen are indispensable to their gathering, analysis and dissemination of the news; that the subpoenaing of newsmen to testify concerning information obtained by them in their professional capacities causes their confidential news sources to become terrified of disclosure and consequently to shut up; that even the mere appearance of a newsman in secret grand jury proceedings, where what he has told cannot be

* Walter Cronkite, Brief for Appellant at 20, Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970).

1. Estes v. Texas, 381 U.S. 532, 539 (1965). *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

2. Application of Caldwell, 311 F. Supp. 358, (N.D. Cal. 1970). The importance of the newsmen's ability to receive and protect confidential information was manifested in a survey conducted by James A. Guest and Alan L. Stanzler, appended to *The Constitutional Argument For Newsmen Concealing Their Sources*, 64 NW. L. REV. 18, 57-61 (1969), indicating that a substantial number of newspaper stories are based on information secured in a confidential setting.

known, destroys his credibility, ruptures his confidential associations, and thereby irreparably damages his ability to function effectively as a newsman; and that the resulting loss of confidence spreads rapidly and widely to other newsmen, thus critically impairing the newsgathering capacities of the media and impoverishing the fund of public information and understanding.[3]

Despite this evidence that the newsman's ability to receive and keep information in confidence is the foundation of the public's ability to be informed on public issues from extremist politics to local corruption; newsmen, as a general rule, must receive and protect such confidential evidence at their peril. The newsman must choose between revealing his confidential source or information, thereby risking a loss of these sources or refusing to reveal his confidential information, which often results in a contempt citation and subsequent jail sentence.[4] The newsmen argue that the courts should interpret the first amendment[5] as giving the newsman a constitutional privilege to conceal confidential sources and information in order to assure the free flow of news. For years newsmen tried to convince courts and legislatures to recognize a common law privilege for newsmen to conceal confidential sources and information. This argument centered upon the public interest in the free flow of news and vague analogies to recognized common law privileges. Although sixteen state legislatures have

3. Brief for Appellant at 17, Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970). It should be noted that these effects are particularly severe in the cases of newsmen covering militant and dissident political groups which are naturally distrustful, and fearful of government suppression.

4. An article in 61 MICH. L. REV 184 (1962) has gone so far as to suggest that a privilege for newsmen is unnecessary because newsmen, abiding by their professional code of ethics, invariably refuse, as a practical matter, to disclose the identity of confidential sources of information, regardless of judicial compulsion. Therefore, journalistic obstinacy supplants the need for constitutional or statutory protections to preve
t restraints on the flow of news from confidential sources to the public, and informants are adequately protected thereby.

At best, this argument indicates a misconception of the problem presented because it is not in the best interests of society to depend for protection of an important constitutional guarantee (freedom of the press) on the fact that people are willing to go to jail to protect this interest.

5. "Congress shall make no law . . . abridging the freedom . . . of the press . . . ." U.S. CONST. Amend I. It has long been recognized that these constitutional prohibitions extend to the exercise of the judicial powers. *See, e.g.*, Blair v. United States, 250 U.S. 273 (1919).

adopted the privilege in statute form, no court has recognized a common law privilege for newsmen.[6]

However in 1958, newsmen began to shift their attack and argued that the first amendment should be interpreted to give them a constitutional privilege to conceal confidential information and sources in order to protect the free flow of news.[7] Up to this point, at least nine courts have considered the constitutional question. These include the Supreme Courts of Colorado,[8] Hawaii,[9] Pennsylvania,[10] Oregon,[11] Massachusetts,[12] Wisconsin,[13] as well as an Army General Court Martial[14] and the Courts of Appeals for the Second[15] and Ninth Circuits.[16] Of these nine decisions, six have denied the privilege.[17] These courts generally found a strong public policy in favor of compulsory testimony by witnesses and little, if any, impairment of the free flow of news.[18] Two other cases indicated an acceptance of the general

6. *See* 7 A.L.R. 3rd 591 (1966) for a treatment of the cases rejecting such a privilege. The major case in this country rejecting the common law privilege is People *ex rel.* Mooney v. Sheriff of New York County, 269 N.Y. 291, 199 N.E. 415 (1936).

7. Most of the early cases presenting the constitutional question dealt merely with protecting the identity of confidential sources, but recently, newsmen have sought constitutional protection for information given in confidence (notes and tapes of interviews, photographs, etc.).

8. Murphy v. Colorado, 365 U.S. 843 (1961) (*cert. denied*).

9. *In re* Goodfader's Appeal, 45 Hawaii 317, 367 P.2d 472 (1961).

10. *In re* Taylor, 412 Pa. 32, 193 A.2d 181 (1963).

11. State v. Buchanan, 250 Ore. 244, 436 P.2d 729, *cert. denied*, 392 U.S. 905 (1968).

12. *In re* Pappas, 266 N.E.2d 297 (Mass. 1971).

13. State v. Knops, 39 U.S.L.W. 2445 (Wis. Feb. 2, 1971).

14. United States v. Calley, 39 U.S.L.W. 2463 (Army General Court-Martial 5th Jud. Cir. Jan. 20, 1971).

15. Garland v. Torre, 259 F.2d 545 (2nd Cir.), *cert. denied*, 358 U.S. 910 (1958).

16. Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970).

17. Murphy v. Colorado, 365 U.S. 843 (1961) (*cert. denied*); *In re* Goodfader's Appeal, 45 Hawaii 317, 367 P.2d 472 (1961). *In re* Taylor, 412 Pa. 32, 193 A.2d 181 (1963); State v. Buchanan, 250 Ore. 244, 436 P.2d 729, *cert. denied*, 392 U.S. 905 (1968); *In re* Pappas, 266 N.E.2d (Mass. 1971); United States v. Calley 29 U.S.L.W. 2463 (Army General Court-Martial 5th Jud. Cir. Jan. 20, 1971).

18. It should be noted that a further reason used by the court in State v. Buchanan, 250 Ore. 244, 436 P.2d 729 (1968), to deny the first amendment claim was the idea that

> [I]t would be difficult to rationalize a rule that would create special constitutional rights for those possessing credentials as newsgatherers which would not conflict with the equal-privileges and equal protection concepts also found in the Constitution.

Id. at 248-49, 436 P.2d at 731. The court's use of the equal protection argument here is "unusual and inappropriate since presumably the requisite state action would consist of

relevance of the first amendment in this area but required the newsmen to testify because of an overriding need for the specific testimony.[19] The only case which has recognized the privilege and allowed its use is *Caldwell v. United States*,[20] which in contrast to *Garland* and *Knops*, failed to find any compelling national interest for testimony of the sort specified. The extent of this conflict between the desire of newsmen to protect their confidential sources and the desire of governmental authorities to obtain facts of criminal conduct or civil misconduct is emphasized by the effort which is being made by the Department of Justice to establish guidelines for the issuing of subpoenas, which will allow both groups to fulfill their duties to the community at large.[21]

II. BACKGROUND

The issue of the newsman's privilege usually arises in four situations: (1) where the newsman has written and his paper has published an article exposing illegal activity or dealing with the activities of militant or dissident political groups and a district attorney or attorney general subpoenas him to appear before a grand jury to divulge names or information so that the government can investigate the activity and prosecute any criminal violators; (2) where statements used by the newsman are relevent to a civil case and he is subpoenaed to testify in behalf of one of the litigants; (3) where either the prosecutor or the defendant seeks the newsman's testimony in a criminal trial of a third person (other than the informant); and (4) where a legislative committee wishes to question the newsman concerning articles or information related to governmental activity.[22] With respect to all of these situations the newsman may plead that the information was received in confidence and he cannot divulge it because to do so would

judicial enforcement of a constitutional privilege. The Supreme Court has never invoked equal protection where the supposed discriminatory act was protected by another constitutional clause. The specific first amendment right of freedom of the press seems to answer any challenge based on fourteenth amendment rights. Guest and Stanzler, *The Constitutional Argument For Newsmen Concealing Their Sources*, 64 NW. L. REV. 18, 41 (1969).

19. Garland v. Torre, 259 F.2d 545 (2nd Cir.), *cert. denied*, 358 U.S. 910 (1958); State v. Knops, 39 U.S.L.W. 2445 (Wis. Feb. 2, 1971).

20. 434 F.2d 1081 (9th Cir. 1970).

21. *See* Address by Attorney General Mitchell, American Bar Association Annual Meeting, August 10, 1970.

22. Guest and Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. L. REV. 19, 20 (1969).

destroy his credibility, rupture his confidential associations, and thereby irreparably damage his ability to function professionally.

It has been noted earlier that there is no common law privilege for a newsman to conceal his sources of information or the information itself.[23] Sixteen states, in varying degrees, grant the newsman a privilege to conceal his sources.[24] As newsmen began to realize that adequate protection was not available in the courts under common law doctrine or through significant legislation, they turned to the first amendment, encouraged by the broad interpretation given it by the Supreme Court.[25]

In 1958 Judy Garland brought an action against the Columbia Broadcasting System (CBS), alleging breach of contract and defamation. The alleged defamatory statements were printed in an article by Marie Torre in the *New York Herald Tribune* and were attributed to a CBS "network executive." Miss Torre refused to reveal the identity of her source on deposition and upon the order of the District Court, this refusal resulting in a criminal contempt citation. On appeal to the Second Circuit Court of Appeals, Mr. Justice Stewart, sitting as a Circuit Judge in *Garland v. Torre*,[26] "accepted at the ouset the hypothesis that compulsory disclosure of a journalist's confidential sources of information may entail an abridgment of press freedom by imposing some limitation upon the availability of news."[27] However, he noted that freedom of the press is not absolute, a fact requiring a determination of "whether the interest to be served by

23. *See* note 6 *supra* and 8 J. WIGMORE, EVIDENCE § 2286 (McNaughton rev. 1961).

24. ALA. CODE RECOMPILED tit. 7, § 370 (1960); ALAS. COMP. LAWS ANN. §§ 09.75.150, 160 (Supp. 1970); ARIZ. NEV. STAT. ANN. § 12-2237 (Supp. 1969); ARK. STAT. ANN. § 43-917 (1964); CAL. EVID. CODE ANN. § 1070 (West 1968); IND. ANN. STAT. § 2-1733 (1968); KY. REV. STAT. § 421.100 (1970); LA. REV. STAT. §§ 45:1451-59 (Cum. Supp. 1969); MD. ANN. CODE Art. 35 § 2 (1965); MICH. STAT. ANN. § 28-945(1) (1954); MONT. REV. CODES ANN. tit. 93 ch. 601-2 (1964); N.J. STAT. ANN. § 2A:84A-21, -29 (Supp. 1969); N.M. STAT. ANN. § 20-1-12.1 (Supp. 1970); N.Y. CIVIL RIGHTS LAW § 79-h (1970); OHIO REV. CODE ANN. § 2739.12 (1964); PA. STAT. ANN. tit. 28, § 330 (1958).

It should be noted however that a number of legislatures, most notably the United States Congress on several occasions, have considered and rejected such statutes.

25. Time, Inc. v. Hill, 385 U.S. 374 (1967); New York Times v. Sullivan, 376 U.S. 254 (1964); Associated Press v. United States, 326 U.S. 1 (1945); Thornhill v. Alabama, 310 U.S. 88 (1940).

26. 259 F.2d 545 (1958).

27. *Id.* at 548.

compelling the testimony in the present case justifies some impairment of this First Amendment freedom."[28] In holding that in this case the Constitution conferred no right to refuse to answer, Stewart held:

> we are not dealing here with the use of the judicial process to force a wholesale disclosure of a newspaper's confidential sources of news, nor with a case where the identity of the news source is of doubtful relevance or materiality. *NAACP v. Alabama,* 357 U.S. 449 (1958). The question asked of the appellant went to the heart of the plaintiff's claim.[29]

The court here seemed to accept the idea of a limited constitutional privilege for the newsman but found that the plaintiff in this case had shown an overriding need for the testimony.[30] The Supreme Court denied certiorari and Miss Torre went to jail for fourteen days.

In 1961, the Supreme Court of Hawaii considered and rejected a newman's argument in favor of a constitutional privilege. The plaintiff, who requested that the newsman reveal his source, had instituted an action against the members of the Honolulu Civil Service Commission seeking reinstatement as a member of the Commission, alleging that her ouster was arbitrary and illegal. The newsman, Goodfader, had attended the ouster meeting because he had received confidential information that an attempt to fire her was being considered. The newsman refused under court order to reveal the identity of his source and was held in contempt. The Supreme Court of Hawaii relied heavily on the *Garland* case in rejecting the privilege but there was no evidence that the identity of the source went to the heart of the plaintiff's claim.

A further case involved Annette Buchanan, a writer for a student newspaper, who wrote an article concerning the use of marijuana. She had promised several marijuana users that if she was permitted to

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28. *Id.*

29. *Id.* at 549-50. In another portion of the opinion, Stewart noted that "[i]f an additional first amendment liberty—the freedom of the press—is here involved, we do not hesitate to conclude that it too must give place under the Constitution to a paramount public interest in the fair administration of justice." 259 F.2d at 549.

This statement has led a number of authorities, including the Supreme Court of Hawaii in *In re* Goodfader's Appeal, 45 Hawaii 317, 367 P.2d 472 (1961), to conclude that *Garland* rejected completely a first amendment privilege for newsmen. However, a complete reading of the decision does not justify that conclusion. *See* Caldwell v. United States, 434 F.2d 1081, 1086 n.6 (1970).

30. A strong dissent by Judge Mizuha dealt with this important distinction and noted that "[h]ere the order which compelled disclosure of the confidential news source was of doubtful relevance or materiality." 367 P.2d at 497.

interview them for publication, their names would not be revealed under any circumstances. Subsequently, she refused to reveal the identity of her sources to a grand jury investigating the use of marijuana. The Supreme Court of Oregon, in *State v. Buchanan*,[31] refused to recognize a newsman's privilege without elaboration as to their reasoning.

The most recent case to deny the existence of a constitutional privilege was *In re Pappas*,[32] decided by the Massachusetts Surpeme Judicial Court. The newsman was covering a riot in New Bedford and wanted to attend a Black Panther news conference. The Black Panthers, who had barricaded a store which was used as their headquarters, allowed him to enter on the condition that he not report anything he heard or saw inside the store except a police raid which never occurred. Pappas appeared before the grand jury, under subpoena, but refused to answer certain questions about what he heard and saw in the Black Panther headquarters. The court denied his assertion of constitutional privilege and rejected the *Caldwell* case, a discussion of which follows, as having disregarded

> important interests of the Federal government and the several states in enforcement of the criminal law for the benefit of the general public . . . [and] as having unnecessarily [expressed], in terms of newly discovered constitutional absolutes, interests of the news media, which (so far as reasonably requiring protection) may be guarded by sound judicial discretion and administration.[33]

The only case to recognize and apply a constitutional privilege for newsmen is *Caldwell v. United States*,[34] recently decided by the Ninth Circuit Court of Appeals. Caldwell, a news reporter for the *New York Times*, was a specialist in the reporting of news concerning the Black Panther Party. He was subpoenaed before a federal grand jury investigating the Black Panthers and the possibility that the Panthers were engaged in criminal activities contrary to federal law. The court of appeals affirmed a district court grant of privilege as to certain matters until such time as the government could demonstrate a compelling and

31. 250 Ore. 244, 436 P.2d 729 (1968).

32. 266 N.E.2d 297 (Mass. 1971).

33. 266 N.E.2d at 302.

34. 434 F.2d 1081 (9th Cir. 1970). It should be noted that the *Pappas* case and the *Caldwell* case differ from the cases earlier discussed because Pappas and Caldwell were trying to protect not only their sources of information but also the very information that they had gathered but may not have published.

overriding national interest in requiring Caldwell's testimony which could not be served by any alternative means.[35] Despite the seeming broad nature of these holdings, the court was careful to indicate that its rule was a narrow one, noting that

> [i]t is not every news source that is as sensitive as the Black Panther Party has been shown to be respecting the performance of the "establishment" press or the extent to which that performance is open to view. It is not every reporter who so uniquely enjoys the trust and the confidence of his sensitive news source.[36]

In all of the cases dealing with the newsman's assertion of privilege to refrain from revealing confidential information or sources the courts have recognized two opposing interests: "the need to compel reluctant witnesses to testify in order to assure the orderly and effective operation of the judicial system on the one hand and the interest in the free flow of news reflected in the first amendment on the other."[37]

III. THE CITIZEN'S DUTY TO TESTIFY

It has long been settled that "the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the government is bound to perform upon being properly summoned,"[38] unless specifically privileged or exempted.[39] The duty to testify is basic to the administration of our system of justice. Wigmore expresses the significance of this principle as follows:

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35. The court of appeals reversed the portion of the district court's order which required Caldwell to appear before the grand jury to answer questions not privileged. This decision was based on the fact that the secrecy surrounding grand jury testimony necessarily introduces uncertainty in the minds of those who fear betrayal of their confidences. The court noted that if there was nothing to which Caldwell could testify that was not already public or that was not protected by the district court's order, the only result of his appearance before the grand jury would be to destroy his capacity as a news gatherer. Therefore, the court held that

> where it has been shown that the public's First Amendment right to be informed would be jeopardized by requiring a journalist to submit to secret Grand Jury interrogation, the Government must respond by demonstrating a compelling need for the witness's presence before judicial process properly can issue to require attendance.

434 F.2d at 1089.

36. 434 F.2d at 1090.

37. Guest and Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. L. REV. 18, 24 (1969).

38. Blair v. United States, 250 U.S. 273, 281 (1919).

39. 8 J. WIGMORE, EVIDENCE § 2190-92 (McNaughton rev. 1961). *See* Blackmer v. United States, 284 U.S. 421, 438 (1932).

> For more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving and that any exemptions which may exist are distinctly exceptional, being so many derogations from apositive general rule.[40]

There also is little doubt that the courts' use of their power to compel witnesses to testify and to cite them for contempt if they refuse does not violate the witness' first amendment freedom of speech.[41] Although the sixth amendment[42] gives the accused in a criminal prosecution power to compel witnesses to testify in his favor, there is some question as to whether or not a civil litigant has a constitutional right to compel testimony. This latter right is an English common law principle adopted by the American judicial system.[43] However, whether or not the civil litigant has a constitutional right to compulsory testimony does not seem important because of the strong tradition of compulsory testimony accepted by our courts.[44]

Although the law recognizes some exceptions to the duty to testify, these exceptions are few[45] and courts and legislatures are reluctant to add to the number. Even where a recognized privilege does exist, the courts often say that privileges, since they inhibit the search for the truth, should be strictly construed.[46] As champion of those who desire to see the use of the privilege strictly limited, Wigmore expresses that position as follows:

> There must be good reason plainly shown, for their existence . . . . The trend of the day, [however]' is to expand them as if they

40. 8 J. WIGMORE, EVIDENCE § 2192 (McNaughton rev. 1961). *See* United States v. Bryan, 339 U.S. 323 (1950).

41. *See* Blair v. United States, 250 U.S. 273 (1919). *See also* Blackmer v. United States, 284 U.S. 421 (1932).

42. "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." U.S. CONST. Amend. VI.

43. Guest and Stanzler, *The Constitutional Argument For Newsmen Concealing Their Sources*, 64 NW. L. REV. 18, 25 (1969), *citing* 8 J. WIGMORE, EVIDENCE § 2192 (McNaughton rev. 1961). However WIGMORE, § 2191 has been cited for the idea that the due process clause grants compulsory process to both the civil and criminal party.

44. *See* Blackmer v. United States, 284 U.S. 421 (1932); Blair v. United States, 250 U.S. 273 (1919).

45. A few of the major privileges include the relationship between husband and wife, attorney and client, and doctor and patient.

46. *See* Hyman v. Grant, 102 Tex. 50, 112 S.W. 1042 (1908). (attorney-client).

> were large and fundamental principles, worthy of pursuit in the remotest analogies. This attitude is an unwholesome one. The investigation of truth and the enforcement of testimonial duty demand the restriction; not the expansion of the privileges. They should be recognized only within the narrowest limits required by principle. Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice.[47]

As was noted earlier, the idea of a common law newsman's privilege to conceal his sources or information was consistently rejected by the courts.[48] Most have held that the relationship between a newsman and his confidential source does not fulfill Wigmore's four fundamental conditions necessary to establish a privilege against compulsory testimony. These four conditions are:

> 1. The communications must originate in a confidence that they will not be disclosed,
>
> 2. The element of confidentiality must be essential to the full and satisfactory maintenance of the relations between the parties,
>
> 3. The relation must be one which in the opinion of the community ought to be sedulously fostered,
>
> 4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.[49]

The argument used by these courts that the conditions are not met with respect to concealing the source of the information goes as follows: (1) The communication itself is not confidential. It is given in order to be published to the community; (2) the confidentiality of the communication is not essential to the relationship between the parties; (3) the community has no interest in protecting the newsman —confidential informant relationship for its own sake; (4) there is no injury caused by the disclosure of the communications because the communications are intended to be disclosed; only the source of the information remains undisclosed.[50]

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47. 8 J. WIGMORE, EVIDENCE § 2192 (McNaughton rev. 1961).

48. People *ex rel.* Mooney v. Sheriff of New York County, 269 N.Y. 291, 199 N.E. 415 (1936). *See* 7 A.L.R.3d 591 (1966) and *In re* Goodfader's Appeal, 45 Hawaii 317, 367 P.2d 472 (1961) for a comprehensive list of those cases which have refused to recognize a common law privilege for newsmen.

49. 8 J. WIGMORE, EVIDENCE § 2285 (McNaughton rev. 1961).

50. There is room for discussion as to the validity of argument #3 because the "opinion of the community" cannot be determined with exactitude. In those states which have adopted the privilege, the "opinion of the community" would seem to be that the

The arguments in favor of the privilege are that the newsman only wants to conceal the identity of the source not the information received from the source and that the mere identity of the source does not fit the notion of "communication" ascertained in Wigmore's four conditions. Even if the identity of the informant is part of the communication, Wigmore's four conditions would still seem to be satisfied: (1) The name was communicated in a confidence that it would not be disclosed; (2) the relationship requires the confidentiality because the informant would not make public his information unless guaranteed anonymity; (3) the community desires to foster the relationship because of its interest in the free flow of news; (4) the injury to the relation and consequent free flow of news, in some instances, outweighs the interest in the correct disposal of the litigation.[51]

The case for a common law privilege where the newsman desires to conceal not only the source of the information but also the unpublished information in his possession is more difficult because the information was clearly given for publication. However more recent cases, such as *Caldwell v. United States,*[52] in which newsmen have attempted to conceal information which they received, reliance has been placed on the first amendment rather than the existence of a common law privilege.

Desptie the plausibility of the argument that the newsman has a common law privilege to conceal his source of information, there seems to be little hope that a court would ever accept the argument. This rejection, however, has little effect upon the ultimate constitutional question. Once into the area of constitutional protection, we are not concerned with an exception to compulsory testimony. Therefore, Wigmore's four fundamental conditions for establishing a privilege are no longer relevant because as indicated by the Supreme Court, conduct tending to restrain the free flow of news is unconstitutional unless

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relationship is one that ought to be sedulously fostered. On the other side of this argument is the fact that the privilege has not gained much acceptance either at common law or in the United States.

Regardless of this uncertainty, Wigmore requires that all four conditions be present before a privilege should be recognized. The absence of one or more of them serves to explain why certain privileges have failed to obtain the recognition demanded for them.

51. Guest and Stanzler, *The Constitutional Argument For Newsmen Concealing Their Sources*, 64 NW. L. REV. 18, 27 (1969).

52. 434 F.2d 1081 (9th Cir. 1970).

strongly justified.[53] Under the common law the presumption was against any privilege. However, instead of trying to justify an exception because of a constitutional interest "a proper analysis should start with the constitutional presumption of a privilege and try to justify its denial because of a common law interest in compulsory testimony."[54] A further reason for treating the constitutional question differently from the common law question is the fact that the newsman-informant relationship differs greatly from the typical common law privilege. In the first place the relationship itself is constitutionally irrelevant except insofar as it protects the public's first amendment right to a "free and untrammelled press." Secondly, the identity of the informant here is confidential; whereas usually both parties are known. Thirdly, the communication itself is disclosed; whereas in the usual privilege the communication is confidential. Fourthly, the privilege belongs to the newsman and he can waive it without the permission of the informant, whereas the privilege normally belongs to the person making the communication. Finally, the newsman may assert the privilege in connection with any information furnished him whether confidential or not; whereas in the normal privilege the privilege may be asserted with respect to confidential communications only.[55] Therefore, because of different approaches between the constitutional question and the common law question, any further reference to Wigmore's conditions in connection with the constitutional question would be meaningless.

IV. THE CASE FOR A CONSTITUTIONAL PRIVILEGE

Any analysis such as this must proceed from a recognition that a free press plays a central role in helping to maintain the other institutions and attitudes of a free society. Recognition of this fundamental mission appears in almost every Supreme Court decision dealing with the freedom of the press. In *Grosjean v. American Press Co.*,[56] the Court invalidated a special tax on newspapers, noting that an abridgement on freedom of the press "goes to the heart of the natural right of the members of an organized society, united for their common good, to impart and acquire information about their common

53. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

54. Guest and Stanzler, *The Constitutional Argument For Newsmen Concealing Their Sources*, 64 NW. L. REV. 18, 28 (1969).

55. STAFF OF SENATE COMMITTEE ON THE JUDICIARY, 89TH CONG., 2D SESS., THE NEWSMAN'S PRIVILEGE (Comm. Print 1966).

56. 297 U.S. 233 (1966).

interest."[57] The Court, in *Associated Press v. United States*,[58] stated "that [the first] amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ."[59] These decisions and many others reflect the primacy of the guarantee of freedom of the press and thereby illuminate the constitutional framework within which inhibitions on the press must be evaluated.

To talk in terms of the first amendment[60] is not to quarrel with the general proposition "that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which *every person* within the jurisdiction of the government is bound to perform upon being properly summoned."[61] However, like every other legal proposition, this one is subject to exceptions and limitations (as expressly recognized in the authorities that establish the proposition);[62] and like every other governmental power, the power of a court or grand jury to compel the appearance of witnesses is limited by the first amendment.

The power of compulsory process of the legislative investigating committee is surely no less important than that of a court or grand jury. The Supreme Court has often recognized the legislature's need and authority "through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it

57. *Id.* at 243.

58. 326 U.S. 1 (1945).

59. *Id.* at 20. *See* Estes v. Texas, 381 U.S. 532, 539 (1965), where the Court said "[t]he free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences . . . ."

60. "Congress shall make no law . . . abridging the freedom . . . of the press . . . ." U.S. CONST. Amend. I.

61. Blair v. United States, 250 U.S. 273, 281 (1919) (emphasis added). *See* United States v. Bryan, 339 U.S. 323, 331 (1950).

62. Blair v. United States, 250 U.S. 273 (1919):

> The duty, so onerous at times, yet so necessary to the administration of justice according to the forms and modes established in our system of government . . . is subject to mitigation in exceptional circumstances; there is a constitutional exemption from being compelled in any criminal case to be a witness against oneself . . . ; some confidential matters are shielded from considerations of policy, and perhaps in other cases for special reasons a witness may be excused from telling all that he knows.

Id. at 281-82.

under the Constitution;"[63] yet this power has repeatedly been subjected to first amendment limitation.[64]

However, the first amendment is not absolute and the protection is subject to compromise, if there are strong policy reasons for restriction;[65] but such restraints have been accepted by the Supreme Court only with great reluctance.[66]

In considering the constitutional question, the first area of inquiry must be to determine whether the process of newsgathering is within the first amendment. Although the courts in *Garland* and *Goodfader* expressed doubts about this,[67] the better view seems to be that freedom of the press to gather the news[68] is the factual and constitutional precondition of freedom of the press to disseminate the news[69] and the freedom of the public to receive it.[70] This, very simply, is what the first amendment is all about.[71]

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63. McGrain v. Daugherty, 273 U.S. 135, 160 (1927). *See also* United States v. Rumely, 345 U.S. 41 (1953); Barenblatt v. United States, 360 U.S. 609 (1959).

64. *See, e.g.*, DeGregory v. Attorney General of New Hampshire, 383 U.S. 825 (1966). *See also* Watkins v. United States, 354 U.S. 178 (1957), where the Court said:

> The Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure. Nor can the First Amendment freedoms of speech, press, . . . or political belief and association be abridged.

Id. at 188.

65. Obscenity and libel are not protected by the first amendment. Ginzburg v. United States, 383 U.S. 463 (1966); Roth v. United States, 354 U.S. 476 (1957).

66. *See, e.g.*, the "clear and present danger" test, established in Schenk v. United States, 249 U.S. 47 (1919) and later interpretations such as Dennis v. United States, 341 U.S. 494 (1951). *See also*, Guest and Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. L. REV. 18, 30-31 (1969).

67. Garland v. Torre, 259 F.2d 545 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958); *In re* Goodfader's Appeal, 45, Hawaii 317, 329, 367 P.2d 472, 479 (1961).

68. Associated Press v. KVOS, 80 F.2d 575, 581 (9th Cir. 1935), *rev'd on other grounds*, 299 U.S. 269 (1936).

69. *See, e.g.*, Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967); Talley v. California, 362 U.S. 60 (1960); Near v. Minnesota, 283 U.S. 697 (1931).

70. *See, e.g.*, Stanley v. Georgia, 394 U.S. 557, 564 (1969); Lamont v. Postmaster General, 381 U.S. 301 (1965); Martin v. City of Struthers, 319 U.S. 141, 143 (1943).

71. The predominant purpose of the . . . [first amendment] was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon

As noted, the Supreme Court, subsequent to *Garland* and *Goodfader*, held that the first amendment did protect the right to receive information.[72] In *Stanley v. Georgia*,[73] while searching Stanley's home for evidence of bookmaking activity, federal and state agents found three reels of eight-millimeter film, which the agents felt were obscene. He was convicted, under Georgia law,[74] of knowingly having possession of obscene matter. The Supreme Court held that the first and fourteenth amendments prohibited making mere private possession of obscene material a crime. Mr. Justice Marshall, speaking for the Court said that:

> It is now well established that the Constitution protects the right to receive information and ideas . . . . This right to receive information and ideas, regardless of their social worth, see Winters v. New York, 333 U.S. 507, 510, 68 S. Ct. 665, 667, 92 L. Ed. 840 (1948), is fundamental to our free society.[75]

This traditional right, expressed in terms of the public's right to know, requires as a necessary corollary that the news media have the right to gather information because the public's right to know is directly dependent upon the media's ability to receive information.[76]

However, this is not to say that the right to gather news is absolute. Some restraint is necessary and reasonable. In *Estes v. Texas*,[77] the Court held that the trial court erred in not barring television transmission of the courtroom proceedings. Despite some attempts, no analogy can properly be drawn between barring reporters from the courtroom to assure fair trials and compelling them to reveal their confidential sources and information to assure fair trials. In the first situation the harm done by the gathering is immediate because the trial is upset by extraneous factors which may influence the court and

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misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.

Grosjean v. American Press Co., 297 U.S. 233, 250 (1936). *See* Time, Inc. v. Hill, 385 U.S. 374 (1967); New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964).

72. Stanley v. Georgia, 394 U.S. 557 (1969); Lamont v. Postmaster General, 381 U.S. 301 (1965).

73. 394 U.S. 557 (1969).

74. GA. CODE ANN. § 26-6301 (Supp. 1968).

75. Stanley v. Georgia, 394 U.S. 557, 564 (1969).

76. "In other words, the State may not, consistently with the spirit of the first amendment, contract the spectrum of available knowledge." Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

77. 381 U.S. 532 (1965).

jury. But when confidential information and sources are involved, no immediate harm is caused by the newsman talking to informants and then publishing the information.[78]

A further argument in favor of the constitutional privilege can be found in the fact that the Supreme Court has long recognized the important role played by the need for associational privacy and anonymity in the protection of first amendment freedoms.[79] In *NAACP v. Alabama,*[80] the Court held that a state statute requiring the NAACP to reveal its members violated rights of freedom of speech and assembly, reasoning that such disclosure of membership might discourage persons from joining and exercising their right to associate freely. Similar logic applies to the case of the newsman's confidential sources because if he were required to reveal such confidential information, this not only would discourage him from divulging the information to the detriment of the free flow of news but also would discourage dissident groups from associating with newsmen and communicating their views.[81]

With the above as background, one need only look to the concept of the informer's privilege in the criminal law to find a precise factual analogy.[82] Government attorneys in an effort to resist defense attempts to secure the identity of the informers have frequently maintained that compelling such disclosure would dry up sources of necessary information. The Supreme Court recognized the need for such a privilege,[83] and has noted that "the purpose of the [informer's] privilege is the furtherance and protection of the public interest in effective law

78. Guest and Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. L. REV. 18, 33 (1969).

79. *See, e.g.*, Shelton v. Tucker, 364 U.S. 475 (1960); NAACP v. Alabama, 357 U.S. 449 (1958); *see generally*, Comment, *The Constitutional Right to Anonymity, Free Speech, Disclosure and the Devil*, 70 YALE L.J. 1084 (1961).

80. 357 U.S. 449 (1958).

81. In NAACP v. Alabama, 357 U.S. 449 (1958), the Court spoke of ". . . the vital relationship between freedom to associate and privacy in one's associations . . . . [I]nviolability of privacy in group associations may in many circumstances be indispensible to preservation of freedom of association particularly when a group espouses dissident beliefs." *Id.* at 462.

82. Wigmore recognized the need for the governmental informer privilege and noted that "its soundness cannot be questioned." 8 J. WIGMORE, EVIDENCE § 2374(f) (McNaughton rev. 1961). He observes that disclosure from informers would be discouraged if their identities were disclosed.

83. McCray v. Illinois, 386 U.S. 300, 311-12 (1967); Scher v. United States, 305 U.S. 251, 254 (1938).

enforcement."[84] It is readily apparent how the arguments for concealing the identity of the governmental informer also apply in the case of the newsman's attempt to conceal the identity of his confidential source or to conceal information given in confidence.

A final argument in favor of the constitutional privilege can be found in the broad interpretation given to the first amendment by such cases as *New York Times Co. v. Sullivan*[85] and *Time, Inc. v. Hill.*[86] In *New York Times Co.*, the Court held that a person could libel a public official only if the false information were published with actual malice. This had the effect of limiting the rights of the public official because of the importance placed on the first amendment freedom of the press. This case was broadened by *Time, Inc. v. Hill* where a family was denied recovery, despite suffering injury to its reputation, because of the danger to the free flow of news. The suit in *Time, Inc. v. Hill* originated after *Life* had carried a story about a play called *The Desperate Hours*. The story was inspired by the actual experiences of the Hill family while being held hostage in their suburban home by three escaped convicts. However, unlike the Hill's experience,[88] the family in the play suffer violence at the hands of the convicts, the father and son are beaten and the daughter is subjected to verbal sexual insults. The *Life* article gave the impression that the play accurately portrayed the experiences of the Hill family.[87]

In denying recovery to the Hill family despite the errors in the story, the Supreme Court first held that the article should be characterized as dissemination of news because it supplied legitimate

84. Roviaro v. United States, 353 U.S. 53, 59 (1957).

85. 376 U.S. 254 (1964).

86. 385 U.S. 374 (1967).

87. In an interview following their ordeal, Mr. Hill stressed the fact that the convicts had treated the family courteously and had released them unharmed.

88. The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community . . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

Time, Inc. v. Hill, 385 U.S. 374, 388 (1967).

newsworthy information in which the public had or might have a proper interest.[88] The Court further noted that:

> [W]e create a grave risk of serious impairment of the indispensible service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, particularly as related to nondefamatory matter.[89]

The analogy to be drawn from this case is that any injury caused to a civil litigant by his inability to force a newsman to reveal his confidential source of information is justified by a superior interest in the free flow of news.

Freedom of the press is a constitutional presumption which can be limited only by a strong showing of another interest (compulsory testimony). The Supreme Court recognized this in 1941 when it held that an obstruction of justice sufficient to limit freedom of the press must be "extremely serious and the degree of imminence extremely high."[90]

Since freedom of the press and other first amendment rights are not absolute,[91] the Supreme Court has devised a balancing test between the asserted constitutional protection and the exercise of the governmental powers. The test has been stated as follows: "Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown."[92]

Most courts which have rejected the newsman's first amendment privilege have based their decisions on the reasoning that freedom of the press is important but not absolute. The Supreme Court will allow limitation of the first amendment where an overriding public interest can be shown. Even though forced disclosure constitutes some impairment of freedom of the press, it is not of a degree sufficient to outweigh the necessity of maintaining the court's fundamental authority to compel testimony. Therefore, under the balancing test, there is no newsman's privilege under the first amendment.[93]

89. 385 U.S. at 389.

90. Bridges v. California, 315 U.S. 252, 263 (1941), *quoted* in *In re* Goodfader's Appeal, 45 Hawaii 317, 357, 367 P.2d 472, 493 (1961) (dissenting opinion).

91. Konisberg v. State Bar of California, 366 U.S. 36 (1961).

92. Barenblatt v. United States, 360 U.S. 109, 126 (1959).

93. *In re* Goodfader's Appeal, 45 Hawaii 317, 357, 367 P.2d 472, 478-80 (1961).

There seems to be little question that the court in *Garland v. Torre*[94] properly framed the issue present in all of the first amendment cases involving newsmen, as follows: "whether the interest to be served by compelling the testimony of the witness in the present case justifies some impairment of this first amendment freedom."[95] The problem with this test has been the fact that some courts have started with the principle of compulsory testimony and then have required justification of the newsman's privilege. *In re Pappas*,[96] in denying a constitutional privilege to the newsman, cited, with approval, the following statement by Professor Edmund M. Morgan: "Such a privilege suppresses valuable evidence to which the trier of fact is competent to give its proper weight. So serious an interference with a rational inquiry can be justified only by accompanying social benefits of high worth."[97]

However, the court in *Caldwell v. United States*[98] demonstrated a proper understanding of the balancing process by noting that in cases involving conflicts between first amendment interests and legislative investigatory needs, the Supreme Court requires the sacrifice of first amendment freedoms only where a compelling need for the particular testimony in question is shown.[99] What is more important than the mere statement of the proper question is that this court, unlike the courts in *Goodfader* and *Pappas*, was able to apply the test correctly. In upholding the privilege, the court cited, with approval, the holding of the District Court:

> When the exercise of the grand jury power of testimonial compulsion so necessary to the effective functioning of the court may impinge upon or repress first amendment rights of freedom of speech, press and association, which centuries of experience have found to be indispensible to the survival of a free society, such power shall not be exercised in a manner likely to do so until there

94. 259 F.2d 545 (1958).

95. *Id.* at 548. *See*, Brief for Appellant at 57 n. 61, Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970).

96. 266 N.E.2d 297 (Mass. 1971).

97. *Id.* at 901, *citing* Morgan, FORWARD TO ALI MODEL CODE OF EVIDENCE at 7 (1942).

98. 434 F.2d 1081 (9th Cir. 1970).

99. *Id.* at 1085-86. *See, e.g.*, Degregory v. Attorney General of New Hampshire, 383 U.S. 825 (1966); Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963); NAACP v. Alabama, 357 U.S. 449 (1958).

> has been a clear showing of a compelling and overriding national interest that cannot be served by any alternative means.[100]

A possible explanation for the misstatement of the balancing requirement by the courts in *Pappas* and *Goodfader* might be that still a majority of the newsman cases have not involved the constitutional question but rather a common law exception to the rule of compulsory testimony. In those common law cases, the presumption against exception was proper.[101]

Two other arguments that have been advanced as reasons for denying a privilege to newsmen are that it would encourage libel and that it would give a favored position to a business enterprise. The fear that a constitutional privilege for newsmen will encourage libel indicates a misconception of the problem. Often the identity of the source is irrelevant to the proceedings against the publication. In the ordinary libel case, falling outside of the scope of *New York Times Co. v. Sullivan*,[102] the burden of proof is on the defendant publication to prove the truth of the story. Therefore, the publication has the option, to no detriment of the plaintiff, either to reveal the source of the information as a method of proving "truth" or to protect the source and risk an adverse judgement if it is unable to prove the truth without the source. However, a case falling within the *Times* rule presents a different issue. In these cases a public official or public figure,[103] suing for libel, must prove that the allegedly defamatory publication was both false and made with "actual malice."[104] Actual malice is proved if the plaintiff can show that the defamatory statement was made falsely or with a reckless disregard for the truth.[105] Proof of actual malice is very difficult under Supreme Court standards and is usually accomplished by showing that a publication is "guilty" of "highly

100. "When we come to examine the various claims of exemptions, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule." 8 J. WIGMORE, EVIDENCE § 2192 (McNaughton rev. 1961). *See also*, United States v. Bryan, 339 U.S. 323 (1950).

101. 434 F.2d at 1086, *citing*, Application of Caldwell, 311 F. Supp. 358, 360 (1970).

102. 376 U.S. 254 (1964).

103. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). *See* Time, Inc. v. Hill, 385 U.S. 374 (1967) where this rule was extended to persons who are newsworthy, whether or not such newsworthiness is voluntary.

104. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

105. *Id.*

unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."[106] The obvious difference between the *Times* situation and the ordinary libel case is that in the *Times* situation the plaintiff must prove actual malice and this may depend upon showing that the informant was unreliable and that the publication violated standard reporting practices by failing to verify the story. There is little doubt that, under any test devised heretofore, the identity of the source could be demanded, without violating the first amendment. However, in order that this not involve wholesale disclosure, a requirement that the plaintiff prove at least the probable falsity of the story before requiring disclosure of the source is reasonable in this situation. The publication would still retain the option to show that it made a good faith effort to determine the truth of the information in order to show that it was not guilty of actual malice, regardless of the reliability of the informer.

The fact that publications are usually intended to be products of profit-making corporations does not affect the constitutional question.[107] Opponents of the privilege argue that newsmen are seeking the constitutional privilege to further their own business purposes and not for the benefit of the public.[108] However, even though newspapers are likely to gain financially by publishing confidential information this would probably be held irrelevant in determining the extent of first amendment freedoms by the Supreme Court which recently said the following in *Time, Inc. v. Hill*:[109]

> Those guarantees are not for the benefit of the press so much as for the benefit of all of us . . . .[110] That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the first amendment.[111]

106. Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967).

107. *See* Comment, 61 MICH. L. REV. 184, 188 (1962).

108. *See* Note, *The Right of a Newsman to Refrain From Divulging the Sources of His Information*, 36 VA. L. REV. 61, 83 (1950); Comment, *Confidentiality of News Sources Under the First Amendment*, 11 STAN. L. REV. 541, 544 (1959).

109. 385 U.S. 374 (1967).

110. *Id.* at 389.

111. *Id.* at 397.

V. THE EFFECT OF A REVIVAL OF THE PRIVILEGE ON THE FREE FLOW OF NEWS

At the present time, a denial of this privilege would likely have a devastating effect upon the gathering and publication of news. It is reasonable to assume that confidentiality is necessary to the maintenance of a relationship with many informers.[112] Also potential sources are likely to be deterred from revealing their information by the unrestricted use of the subpoena power over newsmen.[113] In addition, such use of the subpoena will probably keep reporters from gathering or publishing information that might result in a requirement of complete disclosure.[114] If subpoenas and contempt orders are enforced against newsmen,[115] the press will be unable to uncover criminal activity and governmental corruption and to report the activities of dissident political groups because few informants would likely accept public identification in return for disclosure of their knowledge and "[a]ll of us will be poorer for this."[116]

Although there is no definite evidence that the subpoenaing of newsmen has these effects, the deterrent effect of subpoenas upon the willingness of informants to continue talking to newsmen has been shown by the reaction of militant groups. An example of this resulted in June, 1969, when reporter Anthony Ripley of the *New York Times*

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112. *See* a statement by Max Frankel in the New York Times:

> In private dealings with persons who figure in the news, reporters obtain not only on-the-record comments but also confidential judgments and facts that they then use to appraise the accuracy and meaning of other men's words and deeds. Without that access and without such confidential relationships, such important information would have to be gathered by remote means and much could never be subjected to cross-examination.

New York Times, February 6, 1970, at 40, Col. 4.

113. The relationship [between reporters and such groups as the Black Panthers] depends upon a trust and confidence that is constantly subject to re-examination and that depends in turn on actual knowledge of how news and information imparted have been handled and on the continuing reassurance that the handling has been discreet.

Caldwell v. United States, 434 F.2d 1081, 1088 (9th Cir. 1970).

114. "[I]t is not unreasonable to expect journalists everywhere to temper their reporting so as to reduce the probability that they will be required to submit to interrogation." Caldwell v. United States, 434 F.2d 1081, 1086 (9th Cir. 1970).

115. *See* Brief for Appellant at 15-17, Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970) and affidavits accompanying the brief.

116. Brief for the American Civil Liberties Union as Amicus Curiae at 5, Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970).

was subpoenaed to testify before the House Internal Security Committee because of stories he had written about the 1968 S.D.S. national convention. The result was not only the total destruction of his own relationship with the militants and of his ability to cover militant activity but also severe impairment of the ability of other *Times* reporters to cover the S.D.S., and the exclusion of the entire "establishment press" from the 1969 S.D.S. convention.[117] After Caldwell was subpoenaed on February 2, 1970, similar instances of the inability of other newsmen to get cooperation from formerly useful sources were reported.[118] It should be noted that, in each of the instances cited, the refusal of previously cooperative news sources to cooperate was expressly based upon fears generated by the Caldwell and similar subpoenas.

This problem is compounded when the newsman is required to appear before a grand jury, not only because of the broad scope of investigation,[119] but also because of the secrecy surrounding the proceedings. The grand jury is not required to have a factual basis for commencing an investigation and can pursue rumors which further investigation may prove groundless. It does not need to have probable cause to investigate; but rather its function is to determine if probable cause exists.[120] If a newsman is required to appear behind the closed doors of a federal grand jury armed with such broad powers of inquiry, his confidential relationships are likely to be destroyed because no one

117. Brief for Appellant at 23-24, Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970).

118. The *New York Times* criminal justice correspondent in New York City found his sources unwilling to talk about Black Panther activities in the area. In Los Angeles, a *Newsweek* reporter who had previously had good relations with the local Panther office was refused an interview until he was cleared by the Panther Party Headquarters in Berkeley. He was cleared after giving Newsweek's and his own assurances that they would resist any subpoena. However, by the time he was finally cleared, the subject of the interview had left Los Angeles. A final example involved an ABC television team sent to San Francisco to do a documentary on the Panthers but they were refused permission first by the Black Panther Party and later by the Oakland Black Caucus in the absence of assurances that ABC would resist government subpoenas. As a result the proposed documentary was cancelled. Brief for Appellant at 24-25, Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970).

119. *See* Hale v. Henkel, 201 U.S. 43 (1906). "It is impossible to conceive that . . . the examination of witnesses must be stopped until a basis is laid by an indictment formally preferred, when the very object of the examination is to ascertain who shall be indicted." *Id.* at 65.

120. *See, e.g.*, Wood v. Georgia, 370 U.S. 375 (1962); United States v. Winter, 348 F.2d 204 (2d Cir. 1965), *cert. denied*, 382 U.S. 955 (1965).

outside the jury room knows what questions were asked or answered. The newsman's confidants could not know whether they had been betrayed.[121]

Despite the "compelling need" test established by the *Caldwell* case,[122] severe deterrent effects exist because of the above mentioned characteristics of the grand jury. The practical effect of requiring disclosure before a grand jury is that with respect to the reporting of past actions, newsmen have shown themselves willing to accept contempt citations and with respect to future actions, there is likely to be no story because the source is not likely to take the chance of disclosure. It is difficult to see how the general administration of justice can be harmed by allowing an absolute privilege for newsmen testifying before the grand jury.[123] If the newsman failed to publish the story, there is little likelihood that he could be linked with an occurrence and called to testify but there would be a disastrous effect upon the free flow of news. Also, as noted above if the newsman decided to publish the story while honoring the confidential relationship, it is quite likely that he would accept the contempt citation and the newsman's "burden would become the public's burden, for by restricting him the public's access to reading material would be restricted."[124] The basic justification for allowing an absolute right of nondisclosure concerning newsman-informant communications in all grand jury proceedings is that it is more important to have the information disseminated to the public than to require disclosure. Also to cite a newsman for contempt in a particular case would, in effect, bar newsmen in similar future

121. Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970). The court noted that:

> [T]he relationship [between newsman and news sources] depends upon a trust and confidence that is constantly subject to re-examination and that depends in turn on actual knowledge of how news and information imparted have been handled and on continuing reassurance that the handling has been discreet.
>
> This reassurance disappears when the reporter is called to testify behind closed doors. The secrecy that surrounds grand jury testimony necessarily introduces uncertainty in the minds of those who fear betrayal of their confidences.

Id. at 1088.

122. 434 F.2d 1081, 1086 (9th Cir. 1970).

123. Allowing the newsman an absolute privilege would eliminate the need for them even to appear because there would be nothing to which he could testify. Therefore requiring a newsman to respond to a grand jury subpoena would be a meaningless exercise—one of no benefit to the grand jury.

124. Smith v. California, 361 U.S. 147, 153 (1959).

cases from distributing information which they receive from confidential sources. This right clearly advances the public interests in the first amendment and, as shown above, does not significantly impair the functioning of the grand jury.

A mentioning of those situations where the first amendment protects a newsman's confidential information and sources obviously leads to a discussion of when, if ever, a newsman may be compelled to testify. The newsman's privilege is almost certainly limited by a defendant's sixth amendment right to compulsory testimony in a criminal trial.[125] This restriction is not serious because only rarely is the name of a newsman's confidential source likely to be relevant to the defense of an accused in a criminal trial. It is also not unreasonable to require a newsman to testify at a criminal trial concerning the actions and statements of the defendant informer which relate to the alleged criminal act. This requirement will probably deter only those informers who have reason to fear that they will be indicted on information supplied by sources other than the informer because the source's identity is not endangered by the mere subpoenaing of the newsman since an indictment naming the source is obviously a prerequisite to trial.

The reporter should be willing to testify at a trial (not a closed grand jury or legislative hearing) in order to authenticate matter already published. This involves no breach of confidence and should not deter any potential sources from disclosing their information. Similar reasoning would apply to eyewitness testimony or film of acts or events conducted in public without the exception of confidentiality.

A final area of newsman's testimony would be situations where the publication itself has been validly subject to civil action and the identity of the source of the material published is essential to the provision of full redress. As already noted a newsman could be required to testify in a civil action when his publication is a defendant in a *New York Times Co.* action. However, prior to the compelled testimony, the plaintiff must have shown probable falsity and defamation, and the defendant must have been unable to prove its lack of actual malice, regardless of the source's identity. Of course, the plaintiff cannot compel the

125. "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. CONST. Amend. VI.

testimony if the defendant is willing to accept an adverse judgment as the price of protecting its confidential sources.

These principles are likely to provide far more effective protection for first amendment freedoms than any test heretofore devised.[126] The reason that these tests are not completely effective in protecting first amendment freedoms is that uncertainty still surrounds the relationship between reporter and informant because the courts establishing the tests have offered no guidelines as to what combination of circumstances will satisfy the criteria of the particular test.

VI. CONCLUSION

The rights protected by the first amendment's freedom of the press clause are essential to the functioning of a democratic society. Freedom of the press to gather the news is the factual and constitutional precondition of freedom of the press to disseminate the news, and freedom of the public to receive it. The freedoms may be protected only through the use of confidential relationships which most professional journalists feel are indispensible to their work of gathering, analyzing and publishing the news.[127] However, compelled disclosure of information received by a journalist within the scope of such

126. *Heart of the Matter Test:* In Garland v. Torre, 259 F.2d 545 (2nd Cir. 1958), *cert. denied*, 358 U.S. 910 (1958), the court required the newsman to testify because "[t]he question asked of the appellant [newsman] went to the heart of the plaintiff's claim." *Id.* at 550.

The Justice Department has adopted a deviation of this test in its recent guidelines. Before requesting the Attorney General's authorization for subpoena "[t]here should be sufficient reason to believe that a crime has occurred, from disclosures by non-press sources . . . . There should be sufficient reason to believe that the information sought is essential to a successful investigation . . . . The government should have unsuccessfully attempted to obtain the information from alternative nonpress sources." Address by Attorney General John N. Mitchell, American Bar Association Annual Meeting, Aug. 10, 1970.

Reasonable Likelihood Test: In *In re* Goodfader's Appeal, 45 Hawaii 317, 367 P.2d 472 (1961), the court allowed the disclosure of the newsman's information and sources when there was a reasonable likelihood that the requested information would be relevant to the inquiry.

Compelling Need Test: In Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), the court held that a newsman could not constitutionally be required to testify about information received by him in confidence until there had been a "clear showing of a compelling and overriding national interest that cannot be served by any alternative means." *Id.* at 1086.

127. *See* Application of Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970). *See also* Brief for Appellant at 15-27, 434 F.2d 1081 (9th Cir. 1970).

confidential relationships seriously jeopardizes those relationships, thereby impairing the newsman's ability to gather, analyze and publish the news. Therefore, the public's right to be informed as well as the rights of those, such as dissident groups to communicate their views anonymously requires constitutional recognition and implementation of a newsman's privilege of confidentiality.

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